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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

B.E. ROCK CORP.,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Does a *Leedom v. Kyne* mandamus action seeking preliminary injunctive relief lie when there is a breach of a clear statutory prohibition not discernable on the face of a prohibited "recommendation" issued by an NLRB Hearing Officer under Section 9(b)(1)(C) of the Labor Management Relations Act and which action does not seek to address the merits of the determination as interdicted by the Court in *Boire v. Greyhound.*

B.E. Rock Corp. is a closely-held, non-public corporation that has no parent companies, subsidiaries or affiliates. The respondents here also include James M. Stephens, Individually, and as Chairman of the National Labor Relations Board; Dennis M. Devaney, John N. Raudabaugh, Clifford R. Oviatt, Jr., Individually, and as Members of the National Labor Relations Board; and Daniel Silverman, Individually, and as Regional Director of Region 2 of the National Labor Relations Board. Mary Miller Cracraft was a defendant in her official capacity as member of the National Labor Relations Board prior to the expiration of her term of office.

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B.E. ROCK CORP. d/b/a RAINBOW,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD, *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner B.E. Rock Corp. d/b/a/ RAINBOW ("Rainbow"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Second Circuit are unreported and are reproduced in the appendix at pages 1a and 2a, respectively.[1] The ruling of the United States District Court for the Southern District of New York is reprinted in the appendix at pages 4a and the transcript of the proceedings at 6a.

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[1] "_a" references are to the accompanying Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1991. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. §§ 1254(1) and 1292(a)-(1).

STATUTES INVOLVED

The Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, is involved in this case.

29 U.S.C. § 159(c)(1) provides in pertinent part:

> Whenever a petition shall have been filed...(B) ...the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted upon due notice. *Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.* If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. (Emphasis added).

29 U.S.C. § 159(c)(5) provides:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

STATEMENT OF THE CASE

A. Factual Background

This case presents a question of statutory significance: whether a preliminary injunction is obtainable by an employer to ensure that the Board follows the mandatory procedural language in its enabling statute. In *Leedom v. Kyne*, 358 U.S. 184, 188 (1958), this Court held that an original suit could be brought "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

Rainbow is in the business of providing restaurant, catering, dining, entertainment, and private club services in New York City. On May 8, 1991, a petition for a union election was filed by Local 6 of the Hotel and Restaurant Workers Union ("union") with Region 2 of the Board.

The Board scheduled a hearing pursuant to its Rules and Regulations to consider whether a question concerning representation existed. On the opening day of the hearing, May 29, 1991, the union decided not to submit any evidence until Rainbow had stated its position. Rainbow submitted three separate issues for consideration of the relevant bargaining unit. At issue here is whether the union's proposed wall-to-wall unit was inappropriate in the circumstances as there was no "community of interest" in the employees in the unit sought by the union.[2]

The hearing officer ruled that Rainbow would not be allowed to challenge the breadth of the unit submitted by the union because he declared that there was a presumption of law against

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[2]The other issues are not involved in this Petition. They are whether certain persons were included in the proposed unit who are not statutory employees under the Act and whether the union petition covered employees of an independent contractor that would require the Board to determine first whether a joint employer relationship existed.

Rainbow for which *he* would allow Rainbow's testimony only if Rainbow first presented its position through an offer of proof:

> inasmuch as the Board considers a wall to wall unit appropriate, I'm going to ask that you make an offer of proof with respect to what evidence you're going to submit top [sic: to] show that the unit proposed by the petitioner is inappropriate and I want to caution you, and I know you're aware of this but nonetheless I want to caution you *that the evidence you must show must be more than what would demonstrate what a more appropriate unit would be* or what the best unit would be.

Exhibit L, pp. 19-20 (emphasis added).[3]

> The evidence really must go to the inappropriateness of the unit and *when you've made your offer of proof. I will then decide, based upon your presentation* ***whether or not to hear the testimony*** that you indicated that you're willing to provide, and the reason for it is obviously, *there's a presumption of appropriateness of a wall to wall unit, under 9B of the Act.*

Exhibit L, p. 20 (emphasis added).

On June 10, 1991, Rainbow filed its offer of proof with the hearing officer. Written questions and answers were presented in a voir dire offer of proof by Rainbow which examined the totally different skills by the waiters, differences in dealing with the public and differences in earnings based upon tips, compared to persons working in Rainbow's state-of-the-art kitchen, consisting of over 40 persons paid on a salaried or hourly rate.

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[3]"Exhibit" references are to the Joint Appendix filed in the court of appeals.

It was also shown that different supervisors do the hiring in each of the units, different supervisors do the disciplining, and in each case using their own standards. The "offer" demonstrated a lack of interchange in the groups Rainbow contends are appropriate and different skills by the employees in each group. These are normally the kinds of factors that the Board will consider in making a unit determination.[4]

On June 21, 1991, the hearing officer ruled in a letter to the parties that:

> With respect to the Offer of Proof submitted by the Employer, it is *my opinion* that the Offer of Proof does not sufficiently demonstrate that a question concerning inappropriateness of the petitioned-for unit exists and, therefore *I will not take testimony* on the inappropriateness of the unit.

20a (emphasis added).

On June 26, 1991, when the hearing reconvened, the hearing officer restated his decision on the record:

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[4] The Board, for example, has found a unit of kitchen employees to be a separate bargaining unit from a unit of waiters utilizing the standards demonstrated in the Rainbow's offer of proof. In *Hotel Westward Ho*, 171 N.L.R.B. 1371, 1352-53 (1968), the Board held:

> Effective supervision of the kitchen employees is vested in the chef, including the effective power to hire and discharge employees, dispose of grievances, schedule overtime and vacations, establish working hours and recommend wage increases. The kitchen employees enjoy a separate functional identity centered around their special skills in the preparation of basic foods (hotel guests and diners); the appropriateness of substantial interchange between the kitchen and other employee groupings to the hotel...

> I notified the Parties by letter via fax on Friday that I was rejecting the Employer's Offer of Proof and I'm stating now for the record that with respect to the Employer's Offer of Proof; I've considered the offer and it is my opinion that the evidence importee propers [sic: the employer proffered] does not demonstrate that the petitioned for unit is not an appropriate unit.

Exhibit P.

Finally, the hearing officer prepared a "report" on June 15, 1991, in support of his ruling.

Rainbow requested reconsideration of this ruling from the hearing officer which was denied. On a special appeal to the regional director, 26a, the regional director affirmed the hearing officer's ruling. On July 12, 1991, Rainbow appealed the regional director's ruling to the Board in Washington, D.C. 23a. On July 17, 1991, the Board denied the appeal: "EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL, APPEAL FROM THE REGIONAL DIRECTOR'S DECISION REJECTING EMPLOYER'S OFFER-OF-PROOF, AND REQUEST FOR STAY OF HEARING IS DENIED." 22a.

B. Procedural Setting of the Case

On July 16, 1991, Rainbow filed a Complaint for Writ of Mandamus and Injunctive Relief in the United States District Court for the Southern District of New York and a Motion for Preliminary Injunction and Motion for Temporary Staying Order. The motions were heard by the Hon. Whitman Knapp. Count I of the complaint alleged an express violation of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 159(c)(1)(B). Count II alleged a violation of the Freedom of Information Act

("FOIA"), 5 U.S.C. § 552(a)(4)(B).[5] A hearing was held on July 17, 1991 at which the district court heard Rainbow's request to stay the closing of the Board's representation hearing until such time as the Board decided the appeal and would allow Rainbow to present its evidence, and denied it.[6]

The district court also determined that the hearing officer's action was "an evidentiary ruling that he doesn't want to hear certain evidence." 16a. The district court therefore denied the motion for preliminary injunction. 4a.

On appeal, Rainbow presented the question whether the ruling of the hearing officer did effect an unlawful recommendation (as the prohibition against the employer placing into the record any evidence of employee "community of interests" could only result in approving the union's bargaining unit proposal). It also submitted a motion for *in camera* inspection with the court to review the hearing officer's "Report" if the court could not tell on the face of the pleadings whether an illegal "recommendation" had been made. The court of appeals denied the motion.

The Second Circuit agreed with the district court that the "hearing officer's rejection of Rainbow's offer of proof as irrelevant" was not "in excess of statutory authority." 2a. It opined that "*Kyne* does not create jurisdiction in district courts to review relevancy rulings." 2a. The court of appeals, however, failed to address as part of the *Kyne* test it sought to apply, the

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[5]Rainbow had filed a request under the FOIA for a copy of the hearing officer's report of June 15, 1991. The Board had failed to comply with the FOIA's time limits under 5 U.S.C. § 552(a)(6)(A)(i). This portion of the complaint is not in issue here.

[6]Unbeknownst to the district court and counsel at the hearing, was that the Board had just issued its telegram denying Rainbow's special appeal.

mandatory language and purpose of § 9(c)(1)(B) to its limited reading of *Kyne*.[7]

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S REFUSAL TO APPLY THIS COURT'S CLEAR INSTRUCTION IN *LEEDOM v. KYNE* TO CONFER DISTRICT COURT JURISDICTION AT THE TIME WHEN AN EXPLICIT VIOLATION OF THE ACT IS OCCURRING IN THE BOARD'S PROCEEDINGS, INTERFERES WITH THE ADMINISTRATION OF THE ACT

The Second Circuit's reading of *Leedom v. Kyne*, 358 U.S. 184 (1958), confirms a fundamental disagreement with this Court's limited grant of district court jurisdiction to declare violations of the Labor Management Relations Act of 1947 ("LMRA"). The record in this case provides a proper vehicle for this Court to reestablish a uniform approach to district court jurisdiction that has come to establish disparate tests in the circuit courts.

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[7]At this point in its decision, 3a, the court of appeals quotes this Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), that "[t]he *Kyne* exemption is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." Petitioner asserts that it can be fairly stated from the Second Circuit's use of this sentence adversely to Rainbow, that the Second Circuit did agree the hearing officer made an "assessment of the facts" on the record. On its face, this holding acknowledges the presence of an illegal "recommendation"/endorsement under § 9(c)(1)(B) that the hearing officer in representation cases, unlike administrative law judge's in unfair labor practice cases, is barred from making.

Admittedly, the statute does not provide for direct review of unit determinations. Rather, to obtain review, an employer must commit an unfair labor practice by refusing to bargain with the certified union, so that the review procedures under § 10 of the LMRA dealing with unfair labor practices can be secured. This is the normal route for review.

However, this Court has declared that review by a federal district court need not await a future unfair labor practice decision where the Board has committed a clear violation of a statutory mandate in the Act. *Leedom v. Kyne*, 358 U.S. 184 (1958) (professional employee bargaining unit statutorily inappropriate). The Court has further determined that an allegedly illegal factual or legal conclusion made by the Board cannot be advanced through such a district court proceeding. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (challenging the Board's finding of joint employer relationship in the statutory definition).

Unlike in *Leedom v. Kyne*, whether the LMRA has been violated here has not been admitted by the Board and the Board process has not resulted in a Board order. Unlike *Boire v. Greyhound Corp.*, petitioner is not challenging any legal or factual result yet made by the Board. Rather, the issue of how to enforce the Board's mandatory process has not been previously raised in this Court; this is not a matter seeking to resolve the correctness of the hearing officer's underlying decision.

It is fundamentally more consistent with the statutory design for a district court to quickly consider the mandatory procedure (and "due process") under the Act before the status quo is changed by the Board, rather than to undo a bargaining relationship, judicial process, and added expenses for all parties and the Board to bear in order to sort out the error at a later date. An "employer should not be required to subject itself to the stigma of being guilty of unfair labor practices in order to have standing to appeal the Board's" mandatory violations of the LMRA. *Bullard Co. v. NLRB*, 253 F. Supp. 391, 395 (D.D.C. 1966) (injunction issued where the Board refused to certify the results of a fair election).

In fact, it is utterly impossible for this issue to be raised in any other proceeding. This case is no longer a situation where the petitioner will have an opportunity for the Board to review its evidence. The hearing is closed and under the Board's regulations, its affirmance of the hearing officer's action, 22a, cannot be reviewed in a subsequent unfair labor practice proceeding, 29 C.F.R § 102.67(f): "*Denial* of a request for review *shall constitute an affirmance* of the regional director's action *which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.*" (Emphasis added). Since further access to the Board's process is foreclosed, no interference with the Board's ongoing decisionmaking on the merits will be restricted by district court jurisdiction, even as the district court stated it could not otherwise stop the Board's proceeding, 13a-14a. It is a short term order that will effectively escape any judicial review.

Here, the hearing officer set up the presumption of law that the union's proposed unit was appropriate at the hearing. He then stated Rainbow did not meet his test as he applied the facts to the law. Moreover, the hearing officer never stated he made a ruling on the relevancy of the evidence, because it would be frivolous to rule that evidence of employee "community of interest" is plainly relevant in representation cases. Both how and why the employer's entire argument would be evidentiary irrelevant is nowhere explained by the Board. In fact, decisions on offers of proof until now have been reserved by the Board itself. *See, e.g. Altamont Knitting Mills, Inc.*, 101 N.L.R.B. 525, 527 n.4 (1952).

The challenged action in this case, just as in *Kyne*, involves a "right" which Congress has conferred upon employees in "clear and mandatory" language. There, it was the right of employees "to bargain collectively through representatives of their own choosing" and, as here, the corresponding right to be included in an appropriate bargaining unit. This right is explicitly set forth in section 7 of the Act. See 29 U.S.C. § 157. Furthermore, as proof of how fundamental Congress regarded the "appropriate" unit determination, it commanded the Board in equally "clear and

mandatory" language that "whenever a petition shall be filed," "the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . . . If the Board finds . . . that such a question of representation exists, it shall direct an election. . . ." See 29 U.S.C. § 159(c)(1); *see also NLRB v. Financial Institution Empl. of America*, 475 U.S. 192, 198 (1986) (emphasis added).

Section 9(c)(1)(B) of the Labor Management Relations Act of 1947, 29 U.S.C. § 159(c)(1)(B), further provides that the Board's agents in pursuing investigations concerning the representational needs of petitioning workers will hold hearings in which the petitioning labor organization, the employer and other parties have a full opportunity to submit evidence into the investigatory record from which the Board would make a determination as to an appropriate bargaining unit and other procedural issues. Section 9(c)(1)(B) of the LMRA allows that "[s]uch hearing may be conducted by an officer or employee of the regional office," but precludes any action by such hearing officer to "make any recommendations with respect thereto."

This provision dovetails with § 1(c) of the Administrative Procedure Act, 5 U.S.C. § 557(C), in which Congress has commanded that agencies must allow evidence to be entered into their administrative records. It provides in relevant part that,

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions - (a) proposed findings and conclusions; or (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and (3) supporting reasons for the exceptions or proposed findings or conclusions. (Emphasis added)

The primary purpose of § 9(c)(1)(B)'s explicit prohibition against Hearing Officers in representation cases from making and forwarding decisions and recommendations to the Board was to prevent the Board from being both the trier of fact and judge. *Riverside Press, Inc. v. NLRB*, 415 F.2d 281, 283 (5th Cir. 1969). This purpose was not developed merely in passing by the Congress. It is unanimously proclaimed by both the House and the Senate reports on their respective bills.

Senate Report No. 105 on S. 1126 at 25, reprinted in I NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 431 (1959) ("LEGISLATIVE HISTORY"), explains that:

> Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendation to the Board at the close of such hearing. By the amendments, such hearing officer's duties are confined to presiding at the hearing.

The House Conference Report No. 510 on H.R. 3020 AT 50, I LEGISLATIVE HISTORY, at 554 (1959) (emphasis added), affirms that the purpose of the Senate amendment was adopted by the House to be the law:

> Under the Senate amendment it was provided that such hearing could be conducted by an officer or employee in the regional office who, when he reported to the Board with respect thereto, was prohibited from making any recommendations. Both the House bill and the Senate amendment provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified.
>
> The conference agreement, in section 9(c), follows the provisions of the Senate amend-

> ment, most of which, as indicated, were also contained in the House bill.

The effect of this statutory provision was also vigorously explained in the Senate Minority Report No. 105 Part 2, on S. 1120 at 33, Legislative History at 495, to unreasonably "isolate the Board members from the Board agents who conduct the representation investigations required under the act."[8]

The statute as enacted is precise, it intends to accomplish precisely what its detractors feared, that a full and non-adversarial proceeding would be entertained to consider all evidence of the parties for whom these matters are most important, and not to be blocked from presenting their case for an appropriate unit by unpublished Board rules and prior Board case decisions.

This limitation on hearing officers also implements the separate explicit prohibition on the Board in § 9(c)(5) from finding appropriate units based upon the extent of union organization. By not allowing the record to be skewed toward the extent of organization as the only relevant evidence in the

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[8]The Congress was adamant against outcome determinative Board proceedings. The minority complaint about this provision highlights the majority's purpose to deprive the Board of a clever device to unfairly influence case decisions by using the hearing officer to keep out evidence:

> The only result can be to insulate the Board from some of the facts and deprive it of the informal judgment of the man who knows most about the case. *It will prevent the Board* from following its present wise administrative practice of determining only, on the basis of hearing officers' reports, whether the issues involved are important enough to warrant hearing oral argument, or giving the case priority. Simple cases cannot be handled expeditiously because *the Board will have no ready way of learning at the outset whether the issues are simple or are not simple.*

LEGISLATIVE HISTORY at 496 (emphasis added).

record, the Board is required to explain its decisions based upon all the evidence.[9]

In this case we deal with a request by an employer to ensure that the unit of employees with which it may be required to bargain matches its organizational structure. The Board and the hearing officer, however, has steadfastly ignored Petitioner's statutory right to a full hearing by disregarding the specific mandate of § 9(c)(1) to investigate the petition by receiving all available evidence into the record.

The Board's present administrative practice has simply expunged a Congressionally granted right, but this is exactly what *Kyne* sought to prevent by conferring district court jurisdiction. The Court cautioned that if jurisdiction were lacking, there would be "'a sacrifice or obliteration of a right which Congress' has given professional employees. . . ." *Kyne*, 358 U.S. at 190 *quoting Switchmen's Union*, 320 U.S. at 300. Thus, it concluded, "[t]his Court cannot lightly infer that Congress does not intend judicial

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[9] See Senate Report No. 105 on S. 1126 at 11-12, LEGISLATIVE HISTORY at 417-18 (emphasis added), explaining the congressional intent to prohibit the Board from making representation decisions on the basis of its prior caselaw alone, *i.e.*, each fact situation must be treated anew. At the time of the Congressional hearings, Board practice had prohibited professional workers and craftsmen from voting their own desires despite the presence of Board law since *Globe Machine and Stamping Co.*, 3 N.L.R.B. 294 (1937), that would allow it. The Congress recognized that the Board had backed away from *Globe* in *American Can*, 13 N.L.R.B. 1252:

> where the Board refused to permit craft units to be "carved out" from a broader bargaining unit already established, the Board, except under unusual circumstances, has virtually compelled skilled artisans to remain parts of a comprehensive plant unit. The committee regards the application of this doctrine as inequitable. Our bill still leaves to the Board discretion to review all the facts in determining the appropriate unit, but *it may not decide* that any craft unit is inappropriate *on the ground that a different unit has been established by a prior Board determination*. (Emphasis added).

protection of rights it confers against agency action taken in excess of delegated powers." *Id.*

Therefore, the discrete question presented here is whether where the hearing officer's action deeply suggests that a "recommendation" was made in the form of a "report" or ruling from the bench. Subsumed in this question is whether the *post hoc* characterization of the Board or a court may preclude the opportunity to obtain a determination whether a statutory violation occurred without first deciding what an illegal "recommendation" is, and second, without looking at the document in question. Webster's definition of "recommend" means "to endorse as fit, worthy or competent." *Webster's Ninth New Collegiate Dictionary* (1983). Surely, the hearing officer's actions identified at bar was an endorsement of the Board's law (the "presumption") and a statement of the quality of the proof he would deem "worthy or competent" to rebut the "presumption." The action here in context meets the standard of practical use of the statutory language to prohibit "recommendations."

This important statutory question needs to be reviewed by the Court at this time. Without further clarification by this Court of the important legal issues presented in this case under the LMRA to ensure uniformity of law in the lower federal courts, this question will continue to arise and escape effective review, thereby thwarting the Congressional mandate.

II

DISTRICT COURT'S BY NECESSITY MUST ASSUME JURISDICTION TO ENSURE THAT THE BOARD COMPLIES WITH THE CONGRESS' MANDATORY PROCEDURAL PROVISIONS WHEN A CLEAR STATUTORY VIOLATION OF THE LMRA OCCURS

In *Leedom*, a professional engineer association represented by Kyne was aggrieved by the Board's inclusion of non-professional employees in the bargaining unit, contrary to the mandate of Section 9. The court found the normal "refusal to

bargain route" under Section 10 unnecessary, where there was a clear violation of a statutory mandate.

This case also presents the same section of the LMRA reviewed by the Court in *Leedom v. Kyne*. It reflects the clearest legislative intent to preclude decisionmaking by the Board's hearing officer's in the prescribed "appropriate hearing upon due notice." 29 U.S.C. § 9(c)(1)(B). No facts are in dispute which affect the Board's jurisdiction.[10]

The "sole and narrow question presented in *Leedom*, 358 U.S. at 184, was whether a federal District Court has jurisdiction of an original suit to vacate that determination of the Board made in excess of its powers." The answer was "yes." The Court demonstrated that the point it made in *American Federation of Labor v. Labor Board*, 308 U.S. 401 (1940), concerning jurisdiction under § 1337, "was at pains to point out in that case that '[t]he question [there presented was] distinct from...whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute....'" *Leedom v. Kyne*, 358 U.S. at 187-88.

The Court found that the language of Section 9(c)(1) is "clear and mandatory" in commanding that the Board "shall not" find a unit of professional and non-professional employees appropriate. This is the same Section 9(c)(1) that commands the Board that its hearing officers"*shall not* make any recommendations." In *Leedom v. Kyne*, "[p]lainly, this was an attempted exercise of power that had been specifically withheld." *Id.* at 184.

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[10] It is the evaluation by the Hearing Officer of the Employer's Offer of Proof (Jt. App. Ex. M) submitted on June 10, 1991, and that constitutes the June 18, 1991 "Report" of the Hearing Officer, which physically documents the prohibitive recommendation under § 9(c)(1)(B). The Hearing Officer's "short form" decision by the letter of June 21, 1991, 20a, forbidding the Employer from introducing any evidence on the heart of the issue in the case, *i.e.*, the inappropriateness of the unit, as well as the "Report" itself, is the action taken or "recommendation" prohibited by § 9(c)(1)(B).

Therefore, when the Board's conduct can be shown to plainly violate the Act, "a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation *cannot be disregarded*." *Id.* at 189 (emphasis added).[11]

Furthermore, in *Empresa Hondurena De Vapores, S.A.*, 300 F.2d at 229, the Second Circuit held that a district court does have jurisdiction of a complaint "especially at the suit of the employer" against the NLRB.

> [W]hatever may be the case with respect to orders of the National Mediation Board as to bargaining units, representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

This Court expressly refused to reexamine the Second Circuit Court's jurisdictional holding in *Empresa* and observed that the employer's complaint for injunctive relief "to enjoin the Board's order, we hold falls within the limited exception fashioned in *Leedom v. Kyne*" because "there must be present the affirmative intention of the Congress clearly expressed." *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16, 21-22 (1963).

Moreover, in the only other significant case to review an employer's complaint, *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), the Court considered fully the *employers'* complaint that the Board had erred in classifying two employers as "joint employers" with sufficient control over local labor relations. This Court did not rule that district court jurisdiction of the complaint was unfounded, for in that case, an ultimate ULP could have

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[11]Quoting from *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548, 558 (1930).

been brought against the employers by the union if 1) the petitioning union had won the election and 2) if the employer refused to bargain with that union. The Court simply ruled that "[t]he *Kyne* exception" was inapplicable" in certification proceedings whenever it can be said that an *erroneous assessment* of the particular facts before the Board has led it to a conclusion which does not comport with the law." 376 U.S. at 481 (emphasis added).[12]

Miami Herald Publishing Co. v. Boire, 209 F. Supp. 561 (S.D. Fla. 1962) and *Miami Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993 (D.C. Cir. 1963), are relevant here. In *Miami Herald*, the employer sought both to enjoin a representation election because the Board had allowed economic strikers to vote after twelve months had passed in violation of 29 U.S.C. § 159(c)(3) and a single Board member had also denied the employer's request for review, when the statute requires Board action by at least three members. 29 U.S.C. § 153(b).

The employer filed its complaint in *Miami Herald* the day before the Board's election, and the district court allowed the election to proceed, but ordered the ballots impounded pending further review. The district found that "the [employer's] allegations sufficiently set forth a claim that the Board's action was clearly violative of a specific demand of the Act so as to invoke

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[12] If that is not the sole test under *Kyne*, then surely the Court would have more easily dismissed Greyhound's case because of the employer option ultimately to refuse to bargain and face a possible ULP. *See Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 (D.C. Cir. 1980) (en banc) ("Courts have agreed 'it is not the unavailability of a remedy which triggers the *Kyne* exception, but the violation of a clear statutory demand.'"). This issue was raised and argued in the briefs and at oral argument in the court below. The Second Circuit's refusal to apply this additional threshold urged by the Board recognizes its rejection on this ground even in light of some circuit precedent. *Goethe House v. NLRB*, 869 F.2d 75 (2d Cir. 1989).

jurisdiction of this Court under Section 1337 of Title 28, United States Code." 209 F. Supp. at 562 n.*.[13]

The *Miami Herald* case is particularly apposite to this case. It is one of the few cases where the employer initially was the moving party to avail itself of the *Leedom v. Kyne* exception to reviewability of Board orders. *Also Bullard Co. v. NLRB*, 253 F. Supp. 391, 395 (D.D.C. 1966).

The District Court declined to enjoin the election but ordered the ballots impounded pending final determination of the proceedings before it. The Board subsequently vacated the election and ordered a new election. The union then challenged the procedure in the *Miami Pressmen* case concerning the eligibility of striking employees to vote under the provisions of § 9(c)(3).

The *Miami Pressmen* case stands for the proposition that the *Leedom v. Kyne* doctrine applies not only to negative "shall not" words found to occasion jurisdiction in Leedom but also the affirmative "shall certify" words in § 9(c)(1). 322 F.2d at 997. The court stated: "A party would be as aggrieved by such a failure as by an act of the Board contrary to an express prohibition." *Id.*

The court relied on a Law Review article by Archibald Cox:

> Most of the verbs in other parts of Section 9 are prefaced by "shall." There is nothing to suggest that § 9(b)(1) differs from any other statutory rule concerning the conduct of representation

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[13] The Board failed to appeal the district court's ruling in *Miami Herald*. In the union's later appeal of the Board's subsequent rulings on remand to the Board, before the D.C. Circuit, *Miami Newspaper Printing Pressmen's Union Local 46 v. NLRB v. McCulloch*, the circuit court found *Miami Herald* "not before us and is immaterial to our view of the case." 322 F.2d at 998.

> proceedings. Every plain violation of a statutory rule must therefore be "jurisdictional" in the same sense that the plain violation of § 9(b)(1) was jurisdictional in Leedom v. Kyne. 322 F.2d at 997 n.8.

Petitioner thus asks this Court to conclude that the *Miami Herald* and *Bullard Co.* cases correctly state the rule that provides jurisdiction here. As long as a party can demonstrate that a Regional Director has acted contrary to a clear statutory mandate, such as in the instant case, condoning the actions of its Hearing Officer in making "recommendations" which are clearly prohibited or, in relying upon the extent of union organization which is also clearly prohibited, 29 U.S.C. 159(c)(5), and/or in failing to provide an appropriate hearing, the district court is available to consider the statutory violation.

The clear violation of the statutory mandate in the instant case is that the Hearing Officer here "made recommendations" not only in preparing a report, which is the subject of the FOIA request, which may itself be a prohibited "recommendation" but also by making a substantive decision in his ruling of June 21, 1991, denying Rainbow the right to present any testimony on the appropriateness of the bargaining unit. In determining whether this was a "recommendation" or decision prohibited by § 9(c)(1), a reviewing court must examine the substance of what the Hearing Officer actually did.[14]

The Hearing Officer in setting up the ground rules for permitting Rainbow to present any testimony required it to rebut a presumption he mistakenly held on the appropriateness of a wall-to-wall unit. The Hearing Officer then proceeded to review the entire Offer and made a judgment that the Offer of Proof did not measure up to that presumption and therefore precluded

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[14] Petitioner asked the court of appeals to inspect the "Report" "in camera," to determine if the document is a prohibited "recommendation" and/or a disclosable document under the FOIA. The motion was denied.

Rainbow from presenting any testimony on the subject. That is more than a mere evidentiary ruling found by the court below.

The essence of this case is that where a Hearing Officer weighs evidence and comes to a conclusion prohibiting an employer from presenting any testimonial evidence on the issue of "appropriate bargaining unit," the employer is denied an "appropriate hearing," granted by Congress.[15] When the Hearing Officer, by his ruling, pretermits a decision on the merits because of his judgment concerning the weighing of an offer, he has effectively determined the case, and at the very least made a "recommendation" which is prohibited.

The Court reaffirmed *Kyne's* jurisdictional holding in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192 (1986). In *Financial Institution*, the question was whether an NLRB rule that required all employees in a certified bargaining unit, union as well as non-union, to be allowed to vote for affiliation with another union "exceeds the Board's statutory authority." *Id.* The Court held that it did because noncompliance with the rule meant that the Board would not certify the affiliation and would not require an employer to bargain with the newly affiliated union thus "effectively circumvent[ing] the decertification procedures provided by statute" -- i.e. § 9(c)(1). *Id.*

The Court further acknowledged that its "cases have previously recognized the Board's broad authority to construe provisions of the Act [but] * * * [d]eference to the Board cannot be allowed to slip into judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *Id.* at 4206. Although *Financial Institution* arose in the context of an unfair labor practice proceeding on indirect review of a representation order, *see* 29 U.S.C. § 159(d),

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[15] A requirement for "a full and complete record" 29 C.F.R. § 102.44(a) and a "full opportunity to present their respective positions" 29 C.F.R. § 101.20(c), is provided in the Board's regulations..

the Court clearly was advising that original jurisdiction of the representation case was proper in federal district court.

The conflict occasioned by the court of appeals below is further reflected in *Miami Pressman*. For instance, the D.C. Circuit held that the Board's refusal to certify the results of an admittedly valid representation election contravened a specific duty under § 9(c)(1). Even though "9(c)(1) is not mandatory in all instances" warned the Court, "[o]n these facts" it is and it imposes a mandatory certification requirement and the Board's failure to follow the provision's directive "amounted to arbitrary and capricious conduct . . . depriving the union of a right given by the Act."

Thus, the violation of that duty gave the District Court jurisdiction of the union's action." *Id.*, 322 F.2d at 998. Likewise, in *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir. 1979), the court reiterated the clear and mandatory aspect of § 9(c)(1), but cautioned again that its directives cannot be followed blindly when to do so would conflict with other important goals of the Act. An example provided by the Court in footnote 23 would be a "[r]efusal to certify when there are serious flaws in the electoral process [which] is [in]consistent with the primary purpose of the electoral machinery established by § 9, namely, to determine the true wishes of the majority in the unit" or as in *Hartz Mountain Corp. v. Dotson* when a union makes an "unequivocal post-election disclaimer of interest" in representing the employees. 727 F.2d 1309, 1314 (D.C. Cir. 1984). In other words, the Court in *Bell & Howell* explained, "the mandatory language of §9(c)(1) has been, and must be read in harmony with the basic purposes of the [Act]." Id. at 145.

As shown above, the Board's action in this case is at war with the LMRA's most basic and fundamental purpose of assuring the contours of representation. Just as in *Miami Herald*, *Bullard Co.*, and *Miami Pressman*, "on these facts" § 9(c)(1) is a clear and mandatory provision warranting a district court's exercise of subject matter jurisdiction.

CONCLUSION

This case presents the important issue of time for enforcement raised in thousands of Board cases every year and the issue left open in *Leedom v. Kyne*. Plenary review of these issues is necessary to ensure that uniform treatment is given by the Board to the statutory design under the federal labor statute as *Kyne* contemplated, and to resolve the inherent conflicts among the lower federal courts concerning the nature of the procedural safeguards that are available in the administration of the statute.

For these reasons, petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeal.

Respectfully submitted,

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Dated: November 4, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of October, one thousand nine hundred and ninety-one.

Present:

Honorable William H. Timbers,
Honorable Ralph K. Winter,
Honorable John M. Walker,
Circuit Judges.

B.E. ROCK CORP. d/b/a RAINBOW,

Plaintiff-Appellant,

v. ORDER
91-6181

NATIONAL LABOR RELATIONS BOARD, JAMES M. STEPHENS, Individually, and as Chairman of the National Labor Relations Board; MARY MILLER CRACRAFT, DENNIS M. DEVANEY, JOHN N. RAUDABAUGH, CLIFFORD R. OVIATT, JR., Individually, and as Members of the National Labor Relations Board; DANIEL SILVERMAN, Individually, and as Regional Director of Region 2 of the National labor Relations Board,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States district Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Appellant B.E. Rock Corp. d/b/a Rainbow, appeals from Judge Knapp's denial of a motion for a preliminary injunction restraining the National Labor Relations Board from continuing a representation hearing. The appeal is entirely frivolous.

Rainbow argues that the district court had jurisdiction to enjoin the Board under *Leedom v. Kyne*, 358 U.S. 184 (1958), which held that, if "an order of the Board [is] made in excess of its delegated powers and contrary to a specific prohibition in the Act," district courts have jurisdiction to enjoin the Board. *Id.* at 188. In *Kyne*, the Board included in a bargaining unit professional employees who had not voted to become a part of the unit. This was in direct contravention of a specific provision of the National Labor Relations Act. *See* 29 U.S.C. § 159 (1988). *Kyne* held that, under the circumstances, the district court had jurisdiction to review and enjoin the Board's action. 358 U.S. at 188-89.

Appellant argues that a ruling of the hearing officer in the instant matter is in clear contravention of 29 U.S.C. § 159(c)(1), which states that a hearing officer shall investigate a representation petition, but that the officer "shall not make a recommendation with respect" to the petition. *Id.* Appellant attempts to characterize the hearing officer's rejection of Rainbow's offer of proof as irrelevant as a "recommendation" within the meaning of section 159. We disagree.

The hearing officer in the instant case did not act in excess of statutory authority but merely found that appellant's submission was irrelevant. *Kyne* does not create jurisdiction in district courts to review relevancy rulings. As *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964), stated:

> [t]he *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law.

Id. at 481. Therefore, in this case the district court lacked subject matter jurisdiction.

Because there is no reviewable decision on Rainbow's Freedom of Information Act claim, we need not address it.

Hon. William H. Timbers, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. John M. Walker, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

B. E. ROCK CORP.
d/b/a RAINBOW
30 Rockefeller Plaza
New York, NY 11365

Plaintiff,

v.

THE NATIONAL LABOR RELATIONS BOARD, JAMES M. STEPHENS, Individually, and as Chairman Of The National Labor Relations Board; MARY MILLER CRACRAFT, DENNIS M. DEVANEY, JOHN N. RAUDABAUGH, CLIFFORD R. OVIATT, JR., Individually, and as Members Of The National Labor Relations Board; 1717 Pennsylvania Avenue, N.W. Washington, DC 20570
and,

DANIEL SILVERMAN, Individually and as Regional Director of Region 2 Of The National Labor Relations Board, 26 Federal Plaza New York, New York 10278

Defendants.

CIVIL ACTION
No. 91 CIV.4832
JUDGE KNAPP

MOTION FOR PRELIMINARY INJUNCTION
TO ENJOIN THE CLOSING OF THE BOARD'S
INVESTIGATORY RECORD

* * * * *

Having reviewed the papers submitted by plaintiff, and having heard argument on this motion this morning, for the reasons stated on the record the motion is denied.

SO ORDERED

Dated: July 17, 1991
New York, New York

/S/ Whitman Knapp
WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
B.E. ROCK CORP., d/b/a RAINBOW
30 Rockefeller Plaza
New York, NY 11365

Plaintiff,

v. 91 Civ. 4832 (WN)

THE NATIONAL LABOR RELATIONS BOARD,
JAMES M. STEPHENS, et al.,

Defendants.
----------X

July 17, 1991
9:35 a.m.

Before:

HON. WHITMAN KNAPP
District Judge

APPEARANCES

LANE & MITTENDORF
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JOHN LoBOSCO
Of Counsel
and

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DAVID A. POLLACK, Supervising Attorney
POLLY CHILL
Of Counsel

SOUTHERN DISTRICT REPORTERS 212-791-1020

(In chambers)

MR. LoBOSCO: Your Honor, one administrative matter, if I may.

I'm local counsel for Lane & Mittendorf for the plaintiff, and I would like to move the admission of Mr. Smetana and Mr. Avakian pro hac vice in this action.

THE COURT: All right.

MR. LoBOSCO: Thank you, your Honor.

THE COURT: I assume you think this is premature.

MR. POLLACK: Your Honor, we think it's very premature.

THE COURT: So do I. Maybe you can argue me out of it.

MR. SMETANA: Thank you.

Your Honor, in the papers we have relied on Leedom v. Kyne.

THE COURT: Whichever court has considered it said it should be very narrowly construed.

MR. SMETANA: In terms of the narrow construction, your Honor, you are quite right.

THE COURT: In the first place there's an appeal pending.

MR. SMETANA: Only on one of the issues, your Honor. The complaint is a multiple complaint.

THE COURT: What is the issue in which you have no appeal?

MR. SMETANA: That issue is the issue under the Freedom of
Information Act. We have made a demand in writing --

THE COURT: On what date?

MR. SMETANA: -- 27th of June -- on the 27th of June on the Regional Director for a document. The particular document is the report of the hearing officer in this very case that deals with the very denial of due process that we claim is denied.

THE COURT: When in God's name can you get a report in a pending case?

MR. SMETANA: Your Honor --

THE COURT: What case says that?

MR. SMETANA: -- the case I argued in the Supreme Court held for me, Sears and Roebuck & Co., which was cited --

THE COURT: Let me see it.

MR. SMETANA: It's a 1975 decision. I'll tell you about the case, how it's related. It's not a hundred percent on point.

THE COURT: I wouldn't think so.

MR. SMETANA: I don't want to mislead you.

MR. POLLACK: Also, your Honor, maybe we can just clarify or point out there was no formal report given by the hearing officer to the Regional Director. It was merely a form of a note explaining Mr. Smetana had taken an appeal to a hearing officer's ruling, and there was an appeal to the Regional Director to overrule the hearing officer's ruling. The hearing officer was just providing the background information and the parameters of Mr. Smetana's request. There was no report, so to speak, but just as internal memo.

MR. SMETANA: That was the same defense -- well, let me tell you what the Sears case was about and that was exactly the same defense.

THE COURT: Now, if the Supreme Court said so, I have to give it a certain amount of deference.

MR. SMETANA: Yes. In the Sears case, your Honor -- this is a slight digression, but it is part of this case.

In the Sears case, your Honor, rather than the report, being that's what's involved here -- the analogy is that in the Sears case, there was something called "advice and appeal memorandum," which the government similarly claimed were internal documents. And the agency had the practice of simply giving a short form disposition of an advice memorandum.

Now, an advice memorandum is far less dispositive of any action of what has happened here.

THE COURT: There's an appeal pending --

MR. SMETANA: Not on this issue. On this issue there is no appeal.

THE COURT: -- an appeal pending from the report, from the disposition with respect to its report.

MR. SMETANA: Yes, that's correct. But we say we need the document to perfect our appeal. One of the reasons --

THE COURT: Why do you need a document to perfect your appeal?

MR. SMETANA: That was the identical position that we took in the Sears case. In the Sears case we took the position -- I got a stay from Judge Corcoran who had been appointed by President Roosevelt. The issue at that time was we claimed denial of due process just as we are claiming here. Because we claim in order to perfect our appeal, just as we are trying to do here, just on an administrative internal decision, that we need this advice and appeal memorandum.

THE COURT: How could you possible need it?

MR. SMETANA: We said we needed it to see if the agency acted properly.

THE COURT: The order is either proper or improper.

MR. SMETANA: what the U.S. Supreme Court said -- that's the Sears case.

THE COURT: Maybe I better read this.

MR. SMETANA: It's too long to read it. You don't have to read the whole case.

THE COURT: Let me read the headnote and then tell me what I should read.

I assume you know about this case.

MR. POLLACK: Your Honor, in all fairness, we received these documents at 6 o'clock yesterday after --

THE COURT: But I assume you know about this case, just from your general knowledge.

MR. POLLACK: General knowledge, your Honor. But I'd hate to be held to the letter of it.

THE COURT: Okay.
(Pause)

THE COURT: Well, right here I see something. The appeal memorandum you sent, you wanted in this case, is cleared through the general counsel and sent to the Regional Director who must follow its instructions.
Does that apply to your case?

MR. POLLACK: Absolutely not, your Honor.

THE COURT: I'm asking him. You haven't seen it.

MR. POLLACK: Sorry, your Honor.

MR. SMETANA: That's correct.

THE COURT: Does that apply in this case? Is there anything that anybody must do because of this memorandum?

MR. SMETANA: The regional --

THE COURT: Is there anything anybody must do because of this memorandum, is my question that, you are trying to get?

MR. SMETANA: No.

THE COURT: Then that's certainly the clear distinction to start off with.
(Pause)

MR. SMETANA: There are two parts. There's the advice memoranda and the appeal memoranda.

THE COURT: Is there anything that anybody must do with respect to any memorandum you've asked for?

MR. SMETANA: There's really --

THE COURT: Yes or no.

MR. SMETANA: We don't know that.

THE COURT: As far as you know, no.

MR. POLLACK: Your Honor --

THE COURT: Is that correct?

MR. SMETANA: As far as I know, no.

MR. POLLACK: Your Honor, may I make a comment?

THE COURT: Yes.

MR. POLLACK: The Act specifically provides that the hearing officer may make no recommendations let alone compel the Regional Director to do anything.

THE COURT: They are no better off in the District Court.

MR. SMETANA: That's correctly right.

MR. POLLACK: So the memo, there was nothing for the Regional Director to follow and there were no recommendations and a way for him to proceed.

MR. SMETANA: You see, your Honor, he's just argued our whole case. I know I'm jumping, but it's very important that we stop for a moment.

He stated the Act -- exactly, that the hearing officer is precluded by statute for making any recommendations. The gravamen of this case, apart from reading this report, is that he made a recommendation -- not only made a recommendation, he made a final ruling denying us the opportunity to put on the merits of our case.

THE COURT: Okay, that's bullshit.

MR. SMETANA: It certainly is not, your Honor. We have not been able to put on anything.

THE COURT: What you just said is nonsense.

MR. SMETANA: I beg to differ.

THE COURT: That's the order that you are appealing from.

MR. SMETANA: That's correct.

THE COURT: And they can correct that order.

MR. SMETANA: Yes, I understand that. All I'm asking your Honor to do is stay the proceeding until they do correct it.

THE COURT: They can stay their own proceedings. Make an application to them to stay the proceedings.

MR. SMETANA: We've asked them to do it and they haven't done it.

THE COURT: That's too bad. I'm not going to tell them to stay it unless you find me (indicating) that I've got to do it,

and certainly "who must following instructions." That's the first thing I see here.

MR. SMETANA: That is not the --

THE COURT: Well, let me read more.

MR. SMETANA: That's not the basis of --

THE COURT: As you gather, I think your goddam application is off the wall.

MR. SMETANA: Well, I gather you gather that.
(Pause)
Your Honor, I call your attention to page 158. The essence of the Sears decision is not whether there's a requirement that they must do something. That is not the essence of it. The essence is whether there is a final opinion in the adjudication of the case. That's the essence of the case. What the Supreme Court held is even though these documents were advisory in nature and interlocutory in nature, because they are not final in nature as such, because they are still --

THE COURT: Wait a minute. Are you talking? I'm reading.

MR. SMETANA: I'm sorry, your Honor.
(Pause)

THE COURT: Now, what do you want me to look at?

MR. SMETANA: Now, what I want to call your Honor's attention to is at page 158 and immediately following. The gravamen of the decision in the Sears case is that these were final opinions, and it states, middle of the page, "For essentially the same reason these memoranda were final opinions."

THE COURT: Wait a minute. What page?

MR. SMETANA: 158, 421 U.S. --

THE COURT: I see. 158.

MR. SMETANA: These are final opinions made in the adjudication of cases, and then it goes on at the bottom of the page: "Since an advice or appeals memorandum" -- skipping to the bottom. "Since a advice or appeals memorandum explains the reason for the final disposition --

THE COURT: What final disposition are you talking about?

MR. SMETANA: The final disposition is the disposition of the region -- that's his office (indicating) whether made by the hearing officer or the Regional Director, the final disposition -- let me finish, your Honor. The final disposition was that they absolutely forbade our putting on any evidence on the merits of our case. That was the disposition.

THE COURT: Isn't there an appeal from that decision?

MR. SMETANA: Regardless ---

THE COURT: Is there an appeal from that decision?

MR. SMETANA: Your Honor, yes. That's not the issue. I'll go on. The Supreme Court specifically said that is not the issue.

THE COURT: Where does it say that?

MR. SMETANA: All right. It says right here --

THE COURT: What page now?

MR. SMETANA: I'm still continuing: "Since and advice or appeals memorandum" which was involved "explains the reason for the final disposition" --

THE COURT: What final disposition are you talking about?

MR. SMETANA: I'm sorry. The final disposition --

THE COURT: All I heard about is an evidentiary ruling.

MR. SMETANA: Let me finish, your Honor. The final disposition -- I'll read to you what the Supreme Court says.

(Continuing) -- "explains the final disposition," -- that's the language of the statute -- "it plainly qualifies as an opinion falling within 5 USC 2(a.)"

So they are saying if it explains the final disposition, in this case --

THE COURT: You keep on saying "final disposition." What final disposition are you talking about?

MR. SMETANA: The disposition of Raymond Levitt, the hearing officer --

THE COURT: Let's see. "Dear Sir or Madam." That's old fashion.

This is obviously an evidentiary ruling made in the course of a hearing, and this is under appeal.

MR. SMETANA: But the point, your Honor, is that the actual ruling -- our position is that simply is a short form disposition.

THE COURT: Of an evidentiary question.

MR. SMETANA: No, because it's more than an evidentiary question.

THE COURT: After he excluded this, he made a decision, I assume.

MR. SMETANA: Your Honor --

THE COURT: What you are appealing from.

MR. SMETANA: The essence of the case is that by his very action of excluding it, he has prohibited us under the statute from making any positions. We had an offer --

THE COURT: Who's prohibited?

MR. SMETANA: The hearing officer, the guy that's doing this.

THE COURT: He has made an evidentiary ruling that he doesn't want to hear certain evidence. Now, that may be the stupidest ruling in God's earth. If it isn't, it will be reversed.

MR. SMETANA: He's done more than that, he has absolutely precluded us from putting on our case.

THE COURT: That's nonsense you are talking.

MR. SMETANA: Your Honor --

THE COURT: The trial is going on. I ruled that I will not hear any evidence on insanity. You are going to stop the trial and mandamus that?

MR. SMETANA: No, but if he says, I will not hear any evidence, we'll talk about something else, we'll talk about the time of day.

THE COURT: I will not hear evidence on insanity.

MR. SMETANA: That is not the issue here. He says: I will not hear any evidence on the merit of the issue.

THE COURT: He doesn't say that. He says on a particular issue.

MR. SMETANA: The particular issue is what the case is all about. That's the only issue --

THE COURT: You are talking absolute nonsense.

MR. SMETANA: That's the issue in the case.

THE COURT: Your application is denied.

MR. SMETANA: What about the Freedom of Information Act, your Honor?

THE COURT: Your application is denied. You have a record. You can appeal. You are just talking nonsense.

MR. SMETANA. Thank you. Can I get a stay to appeal?

THE COURT: What?

MR. SMETANA: Can I get a stay for the Second Circuit.

THE COURT: A stay from a denial?

MR. SMETANA: Exactly. That's an appealable order, your Honor.

THE COURT: You can get your stay from the Court of Appeals.

MR. SMETANA: You deny the stay?

THE COURT: Of course I deny it.

MR. SMETANA: All right, thank you.

MR. POLLACK: Thank you very much, your Honor.

MS. CHILL: Thank you.

THE COURT: And the next time, don't come in here without serving your opponent.

(Proceedings adjourned)

| United States Government
| NATIONAL LABOR RELATIONS BOARD
| Region 2
| 26 Federal Plaza - Room 3614
| New York, NY 10278-0104

VIA FAX AND REGULAR MAIL

June 21, 1991

Gerard C. Smetana, Esq.
Richman, Lawrence, Mann, Green &
333 West Wacker Drive, Suite 2860
Chicago, Illinois 60606

Eve Klein, Esq.
SmetanaShea & Gould
1251 Avenue of the Americas
New York, N.Y. 10020

Re: B.E. Rock Corp. d/b/a Rainbow, Case No.2-RC-21029

Dear Sir and Madam:

Please be advised that the hearing in the above-captioned matter is scheduled to resume on Wednesday, June 26, 1991 at 10:00 a.m. and Thursday, June 27, 1991, at 10:00 a.m.

With respect to the Offer of Proof submitted by the Employer, it is my opinion that the Offer of Proof does not sufficiently demonstrate that a question concerning inappropriateness of the petitioned-for unit exists and therefore I will not take testimony on the inappropriateness of the unit.

Please also be advised that the Employer's motion to quash the Petitioner's Subpoena Duces Tecum is denied. The Employer is directed to fully comply with the Subpoena Duces Tecum by the

date the hearing resumes.

Very Truly yours

/S/ Raymond Levitt

Raymond Levitt
Board Agent
(212) 264-0343

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D. C. 20570

JULY 17, 1991

RE: B. E. ROCK CORP., d/b/a RAINBOW, CASE 2-RC-21029. EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL, APPEAL OF THE REGIONAL DIRECTOR'S DECISION REJECTING EMPLOYER'S OFFER-OF-PROOF, AND REQUEST FOR STAY OF HEARING IS DENIED. BY DIRECTION OF THE BOARD.

HOLLACE J. ENOCH
ASSOCIATE EXECUTIVE SECRETARY

cc: NLRB - Region 2
Gerard C. Smetana, Esq.
Eve I. Klein, Esq.

| United States Government
| NATIONAL LABOR RELATIONS BOARD
| Region 2
| 26 Federal Plaza - Room 3614
| New York, NY 10278-0104

VIA FAX & REGULAR MAIL

July 12, 1991

Gerard C. Smetana, Esq.
Richman, Lawrence, Mann,
Greene, & Smetana
Suite 2860
333 West Wacker Drive
Chicago, IL 60606

Re: B.E. Rock Corp., d/b/a Rainbow Room
Case No. 2-RC-21029

Dear Mr. Smetana:

This is in response to your letter of July 10, 1991, in which you request a special appeal of the Hearing Officer's decision concerning the Employer's offer of proof and motion to quash the Petitioner's subpoenas ad testificandum.

The request for special appeal with respect to the Hearing Officer's rejection of the Employer's offer of proof regarding evidence bearing on the appropriateness of the unit sought is denied without prejudice to your right to raise this after the close of the hearing. You contend that Section 101.20(c) of the Board's Rules and Regulations mandates that parties have an unfettered right to present any evidence that they wish. In my view this action does not restrict the Hearing Officer's discretion to reject irrelevant or unnecessarily burdensome testimony. Accordingly, it would appear necessary for me to fully review the record to determine whether the Hearing Officer's discretion was exercised properly.

With respect to your reliance upon Section 9(c)(11) of the Administrative Procedures Act as a basis for prohibiting the Hearing Officer from making any recommendations, it should be noted that the Hearing Officer's ruling rejecting your offer of proof addresses only the question of relevant testimony to be received into evidence, and does not constitute a decision or recommendation as to the validity of the unit sought in this matter.

Regarding the matter of the subpoenas, to the extent that the parties have witnesses who are not scheduled to testify on a given day, these witnesses will be released by the Hearing Officer, until such time as they will be scheduled to testify, since their attendance is not necessary, while other witnesses are testifying. Parties may not subpoena witnesses for the purpose of compelling them to attend the hearing and to observe, but may only request their presence to testify under subpoena. Thus, employees who have been served with subpoenas will only be required to attend the hearing, if and when they have been previously scheduled to testify. After temporarily releasing the employees from the requirements to attend the hearing pursuant to subpoena, the Hearing Officer, and the Region have no authority to instruct employees in any further manner regarding their obligations or whereabouts.

However, both parties are urged to discuss, in advance, the matter of scheduling of all witnesses in this proceeding, in order to provide and maintain an orderly flow of witnesses and testimony and to avoid the need for further disagreements in this regard. By so doing, the due process rights of the parties will be maintained and any disruption of the Employer's operations will hopefully be minimized. The Hearing Officer will enforce his discretion regarding the scheduling of witnesses, consistent with

these guidelines.

Very truly yours,

/S/ Daniel Silverman
by CFD

Daniel Silverman
Regional Director

cc: Eve Klein, Esq.

NATIONAL LABOR RELATIONS BOARD
REGION 2

IN THE MATTER OF:
B. E. ROCK CORP.,
d/b/a RAINBOW,

Case No. 2-RC-21029

and

Before Hearing Officer
Raymond Levitt

LOCAL 6, HOTEL, RESTAURANT
& CLUB EMPLOYEES AND
BARTENDERS UNION AFL-CIO

APPEAL TO THE REGIONAL DIRECTOR OF THE HEARING OFFICER'S REJECTION OF EMPLOYER'S OFFER OF PROOF

NOW COMES the Employer, B. E. Rock Corp., Inc., d/b/a Rainbow, by its attorney, Gerard C. Smetana, pursuant to 5 U.S.C. Sec. 557(c) and 29 U.S.C. 159(5) appeals to the Regional Director regarding the Hearing Officer's Rejection of Employer's Offer of Proof.

1. At the Hearing Officer's request on June 11, 1991, the Employer submitted to these proceedings an Offer of Proof to demonstrate that a question concerning representation exists regarding the appropriateness of the bargaining unit petitioned for so that evidence can be taken upon the matters set forth in the Employer's Offer. The Employer invested a great deal of time and effort to prepare the Offer of Proof to the extent that over 150 pages of argument and evidence were submitted in support of Employer's position.

2. On June 24, 1991, Employer's counsel, Gerard C. Smetana, received the decision of the Hearing Officer on whether to allow the Employer to present evidence pursuant to

its Offer of Proof. The complete text of the Hearing Officer's decision states:

> "With respect to the Offer of Proof submitted by the Employer, it is my opinion that the Offer of Proof does not sufficiently demonstrate that a question concerning inappropriateness of the petitioned-for unit exists and, therefore, I will not take testimony on the inappropriateness of the unit."

3. The Administrative Procedures Act 5 U.S.C. Sec. 557 (c) states:

> "Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions --
>
> (1) proposed findings and conclusions; or
> (2) exceptions to the decisions of recommended decisions of subordinate employees or to tentative agency decisions; and
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of --
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
> (B) the appropriate rule, order, sanction, relief, or denial thereof."

4. On June 26, 1991, the Employer moved the Hearing Officer for reconsideration of his decision, a copy of the motion

is attached hereto as Exhibit "A", which the Hearing Officer also summarily denied without reason or explanation.

5. The Hearing Officer's decision is insufficient under Section 557(c) whereby his decision does not provide a sufficient statement of reasons that would present a sufficient record to allow the Employer the opportunity of appeal or a reasonable opportunity to submit evidence for the consideration of its position.

6. The National Labor Relations Board is bound by the provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 557(c) requiring a statement of findings and conclusions on decisions by its agent, *International Union, United Auto v. N.L.-R.B.*, (1971) 147 App. D.C. 289, 455 F.2d 1357, 1369.

7. Apparently, the only basis for the Hearing Officer's ruling is that the cases decided by the Board in which the wall-to-wall unit were found to be appropriate are cases where the union was seeking that unit. We have made a search of all cases since the Wagner Act was passed in 1934. Since that time in the hotel and restaurant industry, the Board has never found appropriate a unit sought by the Employer where the union seeks a larger or smaller unit.

8. The National Labor Relations Act at 29 U.S.C. 159(5) states that:

> In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlled.

9. We have found less than the whole group was appropriate where the union seeks approval. Our Offer of Proof shows that the Employer can introduce evidence consistent with the standards set out in prior Board cases as cited in the Offer of Proof that find less than the wall-to-wall unit to be appropriate.

However, the Hearing Officer and Regional Director appear to be taking the position that less than the overall unit is appropriate only if the union acquiesces or seeks the smaller unit. Such a decision following the union's extent of organization fails to consider the community of interests in the units claimed appropriate by the Employer where there is no central hiring, firing, promotion, and assignment of work. All such personnel decisions are made by the supervisors in the units the Employer deems appropriate.

10. The Employer has demonstrated and produced in its Offer of Proof all of the requisite facts and elements to establish that the Employer could prove separate bargaining units. In addition, the Employer has cited and distinguished legal authority through recognized Board cases to support the evidence presented. However, despite the Employer's meritorious arguments, the Hearing Officer has failed to recognize the Employer's Offer of Proof by failing to provide reasons for his denial of allowing the Employer to submit evidence to support its position or to find appropriate separate units within the Employer's business.

11. The summary below of the Employer's Offer of Proof analyzes and distinguishes the instant case from Board cases on the subject of unit placement. Clearly, the Offer of Proof illustrated and supported the Employer's position that separate units are appropriate and that it is entitled to put forth evidence for its position.

a) The Offer of Proof first analyzes the early Board's decision in *Arlington Hotel*, 126 NLRB 400 (1960) from the instant case. The *Arlington Hotel* case shows that the kitchen employees which are one of the main units that this Employer considers to be separate and are not discussed by the Board in any detail in its conclusion that an overall unit including food service, as well as, kitchen staff was a presumption appropriate unit. The Board's only explanation for including kitchen groups in the overall unit was that "many of these employees have

customer contact in personality and dress requirements similar to those of employees whom the petitioner would exclude."

In the instant case, the Employer would show that the persons in the back of the house, i.e. kitchen, who are not supervisory, have no "contact" whatsoever "with customers" and have no "personality" requirements to be pleasant and sell nor do they have any "dress requirements which are all similar" to the front of the house, such as do the waiters or bartenders.

b) The next factor considered in *Arlington Hotel* was that "there is a high degree of cooperation among all of the employees and integration of all of the departments, in the common goal of serving the hotel guests." Though the Employer can demonstrate that many of its departments which it claims are not part of the propose overall unit have little or no contact with other departments. However, the Board no longer seems to be following the "contact or touching analysis" especially in light of its 1984 decision in *ASO Corp. d/b/a Atlanta Hilton and Towers*, 273 NLRB 87.

c) In *Atlanta Hilton*, the Board overturned a separate unit consisting of essentially part-time housekeeping, laundry employees, and a series of other separate units that included part-time food and beverage employees. Here, the Board articulated several reasons for its findings which the Employer can use to illustrate its position and distinguish the instant case. The basis that the Board found for finding the overall unit appropriate in the *Atlanta Hilton* was the "highly centralized management by the General Manager to the various Department Heads." The Employer can demonstrate to the contrary that Viktor Baker, General Manager at Rainbow, delegates substantial responsibilities to each of his Department Heads each of who conducts and administers their own policies in the personnel area and makes their own decisions. The test of whether individual areas are separate units at *Atlanta Hilton* is "individual Department Heads oversee routine operations in their area but do not establish basic work policies or have final control."

Viktor Baker will testify exactly to the opposite that the individual Department Heads have substantial control over their department, that basic policies such as hiring, firing and responsible direction of the work is set by the Department Head. Unlike in *Atlanta Hilton* whether the Board relied upon the fact that the Hotel Human Resources Department set uniform policies including wages and benefits, we can show that tip distribution, discipline, and assignment of work are left to the Department Managers and front line supervisors.

d) The Board in *Atlanta Hilton* also relied on the fact that employees were cross-trained for various jobs at the facility. Clearly, the Employer will present evidence that there is no cross-training between the front of the house and the back of the house. Similarly, there is no cross-training between the bakery and other persons working in the back of the house or the bakery or the utility are.

e) In *Atlanta Hilton*, the hotel was found to have a "Uniform Transfer Policy." Again, clearly, there would be no situation where persons from the back of the house at Rainbow would be considered for openings in the front of the house, or vice versa.

f) The Employer suggests that a separate housekeeping, houseman's department, account payable clerk, issue and receiving department, kitchen, the wardrobe department, pastry shop, and utility unit, be appropriate as these employees do not interchange with other employees of Rainbow and are each distinctive contrary to the units considered in *Atlanta Hilton* where "accounting personnel have worked as bartenders and credit personnel as hostesses, etc." At Rainbow, as the evidence will demonstrate, there is not interchange between these departments with anyone else in the house.

g) The Offer of Proof also discussed the *Atlanta Hilton* decision of the Board's retreat from the integration rule set forth in *77 Operating Co.*, 160 NLRB 927. Specifically, starting at 90:

> "In making unit determination in the hotel industry, the Board applies the same general criteria used in other industries, including distinctions in skills and functions and of particular employees groups, and separate supervision, employees organizational structure and differences and wages and hours, as well as integration of operations and employee transfer interchange and contacts." 273 NLRB 87 at Page 90.

This latter quote then sets forth the test to be applied in the instant case in determining the appropriateness of the bargaining unit. We would submit evidence to show that except for "contacts," and of necessity there is always a contact from one employee to another in the food service business, there is no interchange between the following groups of employees that we contend are separate bargaining units: between the front of the house and the back of the house; in the back of the house, between bake shop and the rest of the kitchen; between utility and the rest of the kitchen; between the housekeeping and the front of the house employees or housekeeping and the kitchen; between housemen and the front of the house and between housemen and waiters; between the wardrobe or uniform area and any other group of employees. "Distinction in skills and functions of particular employee groups are also a factor that justify the separateness of the units."

We would present evidence to show that waitpersons have totally different skills than persons in the back of the house or persons performing any other duties in any other of the separate units suggested. They have different skills than bake shop, utility, housekeeping, housemen; conversely, the same would be said of each of the other groups mentioned as to waiters.

h) The Offer of Proof goes on to cite and apply to the instant case a number of recent cases where the Board has held less than "a wall-to-wall" unit to be appropriate. In *Diana's Hotel Corp.*, 295 NLRB 127 (1989), the Board found separate bargaining units, as we contend here, by finding that different

wage scales between the departments, infrequent assistance between departments, separate supervision, lack of interchange between employees, and most importantly a great variance in the type of work performed, would be sufficient to create separate bargaining units for housekeeping, maintenance employees, and front desk employees. As indicated earlier in this summary and in the Offer of Proof the Employer can establish and put on evidence to meet the criteria for an appropriate separate unit as the Board articulates in *Diana's Hotel.*

i) Another recent case which the Board found less than a wall-to-wall unit to be appropriate is the 1988 Board's decision *Western Lodging Corp. d/b/a Stanford Park Hotel and Hotel Employees and Restaurant Employees Local 340,* 287 NLRB 1291, where the Board held separate units for housekeeping and maintenance employees. Here, the Board based its holding almost exclusively upon the separate supervision of the departments similar to the supervision at Rainbow where the Department Heads hire, fire, promote, and direct the work of the departmental employees.

j) In *Hotel Westward Ho,* 171 NLRB 1371 (1968), the Board held:

> "Effective supervision of the Kitchen employees is vested in the chef, including the effective power to hire and discharge employees,dispose of grievances, schedule overtime and vacations, establish working hours and recommend wage increases. The kitchen employees enjoy a separate functional identity centered around their special skills in the preparation of basic foods (hotel guests and diners); the appropriateness of substantial interchange between the kitchen and other employee groupings to the hotel..."

The above quote is on "all fours" with the Offer of Proof submitted by the Employer for a separate unit for kitchen employees, and the same logic as to separate hiring and firing

discussed in the kitchen unit contended for is equally applicable to the other units contended for.

f) The Employer also produced in its Offer of Proof a question and answer type summary of Viktor Baker regarding the separateness of the various bargaining units at Rainbow. This Voir Dire Offer of Proof demonstrated the uniqueness and separateness of the various units at Rainbow and further illustrated that the Employer is prepared to put on credible evidence to support its position pursuant to caselaw.

13. The only distinction between the position espoused by the Employer in this case and the holdings in the cases cited to support separate bargaining units is that in the cases cited it was the union that was seeking the separate bargaining units rather than the Employer. It is, however, amply clear that the extent of organization cannot be the basis for determination. If the Board's decision on unit determination is to follow the criteria that the Board itself has followed and that we highlight in this Offer of Proof, then the criteria must be even-handedly applied regardless who is contending for the appropriateness of the bargaining unit. After all, the Taft-Hartley Act was amended in 1947. The preamble was changed to make it clear that employees have as much of a right to organize as to be free from organizing and, thus, extent of organization cannot be controlling.

WHEREFORE, the Employer, B. E. Rock Corp., d/b/a Rainbow respectfully requests that the Regional Director overturn the decision of the Hearing Officer to deny the Employer's Offer of Proof or in the alternative to direct the Hearing Officer to issue a decision pursuant to the Administrative Procedures Act, 5 U.S.C. Sec. 557(c) which articulates the reasons and conclusions for its finding so that the record is complete, that the Employer have an opportunity to present evidence in support of its position, and that the Employer is

allowed the opportunity to appeal the decision by the Hearing Officer.

B. E. ROCK CORP. /d/b/a
Rainbow

_____
By its attorney

Gerard C. Smetana, P.C.
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& Smetana
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